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NO. ~~A-454~~

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition was this ____ day of January, 1982, mailed to Hon. Miron A. Love, Harris County District Court, Harris County, Texas; Hon. Bert Graham and Hon. John S. Holleman, Assistant District Attorneys, Harris County Courthouse, Houston, Texas.

Robert E. Sanders

Jack G. Brown

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective counsel in this capital case, guaranteed by the Sixth, Eighth and Fourteenth Amendments, when the Trial Court denied Petitioner's Motions to remove court-appointed counsel and to grant a continuance designed to give retained counsel time to prepare for trial, thereby forcing Petitioner to face the capital offense with counsel he could not work with or trust.

2. Whether the Trial Court's error in admitting evidence of an extraneous offense during the guilt and innocence stage of the trial to prove identity violated Petitioner's right to fair trial and due process under the Fourteenth Amendment.

3. Whether the Trial Court's action in proceeding to trial with Marilyn Janet Turner as a juror after she informed the Court that as a result of a narrow escape from her own murder created prejudice and bias in her attitude; thereby depriving Petitioner of his right to a fair trial by a jury unbiased and unprejudiced.

4. Whether the Trial Court's exclusion of prospective juror Marian Hall was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968); thereby depriving Petitioner to his right to a fair trial by a jury unbiased and unprejudiced.

5. Whether the Trial Court's exclusion of prospective juror Mildred Spensley was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968) and thereby deprived Petitioner of his right to a fair trial by a jury unbiased and unprejudiced.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner Charles William Bass respectfully prays that a Writ of Certiorari issue to review the Judgment of the Texas Court of Criminal Appeals in this case.

Citation to Opinion Below

The majority opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A.

Jurisdiction

The Judgment of the Texas Court of Criminal Appeals was entered on September 23, 1981. A timely Petition for rehearing was denied on October 28, 1981. On November 25, 1981, Justice White issued an Order staying the sentence of execution pending filing of Petition for Writ of Certiorari with this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first federal question was raised by Robert E. Sanders, Amicus Curiae, in his Motion for reconsideration of appeal filed with the Texas Court of Criminal Appeals on October 8, 1981. The Brief filed by the Amicus Curiae addressed the question of whether the denial by the Trial Court to grant Petitioner's Pro Se Motion seeking removal of appointed counsel and continuance to allow retained counsel to prepare for trial deprived Petitioner of his constitutional right to have the effective assistance of counsel. The Court of Criminal Appeals of Texas never addressed this issue at any time. See Amicus Curiae Brief attached hereto as Appendix B.

2. Petitioner urged that the admission of evidence of an extraneous criminal offense during the guilt and innocence stage of the trial to prove identity deprived him of a fair trial and due process guaranteed by the United States Constitution. Petitioner's counsel contended such admission was reversible error in Ground of Error number 4. See Petitioner's Appellate Brief pp. 16-20, here attached as Appendix C. The Texas Court of Criminal Appeals agreed this was error, but found that the error was harmless. See Appendix A pp. 3-4.

3. Petitioner urged that the conviction rendered be reversed because of the Trial Court's ruling requiring Marilyn Janet Turner to serve as a juror after being subjected to a life threatening situation which created a prejudice and bias in her attitude. See Appellate Brief in Court of Criminal Appeals at pp. 10-13 attached as Appendix C. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's contention of error. See Appendix A, pp. 5-7.

4. Petitioner stated that exclusion of prospective

juror Marian Hall was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). See Appellate Brief, pp. 21-23. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's argument. See Appendix A, p. 12.

5. Petitioner stated that exclusion of prospective juror Mildred Spensley was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). See Appellate Brief pp. 22-23. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's argument. See Appendix A, pp. 12-13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Sixth Amendment to the Constitution of the United States, which provides in the relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. This cause involves the Fourteenth Amendment to the Constitution of the United States, which provides in the relevant parts:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

3. This cause involves the following Sections of the Texas Criminal Code:

> Article 36.29 V.A.C.C.P. which provides:
>
> "Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the Court read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it."

Texas Penal Code Section 12.31(b)

STATEMENT OF THE CASE

On August 16, 1979, Charles William Bass was walking slowly down a lonely dark street in Houston, Texas. (R. 2646). Two Houston City Marshalls were cruising on that same street. (R. 2468). City Marshalls are employed by the Municipal Courts in Houston to serve misdemeanor warrants: simple assault, traffic violations, traffic tickets and Class C misdemeanors. (R. 2470). On the night in question, Officers Charles Baker and R. A. McCammon were searching for an individual, Gregory Webb, pursuant to a warrant issued by the Municiapl Court. (R. 2470). Mr. Webb was charged with the offense of driving with no operator's license. (R. 2470). Officer Baker had arrested Mr. Webb on an occasion prior to August 16, 1979. At approximately 9:15 p.m., the two officers observed the Petitioner walking down this Houston street. (R. 2471).

The two officers stopped their cruiser and ordered the Petitioner to approach the automobile. (R. 2473). The Petitioner complied with this instruction. Officer Baker began to interrogate the Petitioner. (R. 2474). Upon discovering that Petitioner had no identification, the officers exited from their cruiser and began to conduct serious investigation for no apparent reason. Officer R. A. McCammon conducted an extensive search of the person of the Petitioner for, again, no apparent reason. (R. 2649). At this time, Officer R. A. McCammon discovered rolled coins in the Petitioner's pockets.

With the discovery of the coins, the action of the police officers became now physical in nature. Officer McCammon stated that "This little bastard has just ripped somebody off, let's whip his ass and find out who!". The Petitioner was thrown to the hood of the car and Officer Baker grabbed his arm and held him. (R. 2649-50). At this point, the Petitioner pulled a gun that he was carrying out and shot Officer Baker in what he believed was self

defense. (R. 2650). The Petitioner had been exposed to police brutality on numerous occasions, and therefore when placed in danger on August 16, 1979, of another physical assault by a police officer, he defended himself.

Officer McCammon fired shots at the Petitioner, striking him once in the leg, before the Petitioner fled into the night. (R. 2616). The Petitioner's flight brought him to Covington, Kentucky. (R. 2653). On August 20, 1979, the Petitioner was arrested in Covington, Kentucky. (R. 2653). The Petitioner, having been before the Texas judicial system on prior occasions, and fearing for his life and safety, fought extradiction in the Courts of Kentucky. After a battle of nearly six months, the Petitioner was returned to Texas in January, 1980, to face the charge of capital murder.

The Petitioner was arraigned on February 28, 1980, in Houston, Texas. (R. 10). At that time, the Court appointed Mr. Victor Blaine to defend the Petitioner; as the Petitioner was an indigent and unable to provide his own legal counsel. The trial date of April 22, 1980, was set by the Court in March of 1980.

Communications between the Petitioner and his appointed counsel began to deteriorate rapidly. The Petitioner sought legal assistance from other sources. The Petitioner lacked confidence in his appointed counsel and, in fact, felt no effective attorney-client relationship could exist between the Petitioner and Mr. Blaine. After nearly a month of pleas to various legal groups such as the Southern Poverty Law Center, the Petitioner finally was able to secure legal counsel of his own choosing. The Petitioner tendered Motions Pro Se to the Court requesting that a continuance be granted and appointed counsel be removed.

On April 17, 1980, the case came before Judge Miron A. Love of 177th District Court in Harris County, Texas,

for a hearing on the Motions filed by the Petitioner. (R. 3). The State of Texas was represented by the Honorable Bert Graham, Assistant District Attorney for Harris County. (R. 4). The Petitioner appeared in person and was also represented by court-appointed counsel, Mr. Victor Blaine. Mr. Robert E. Sanders, a licensed attorney in the Commonwealth of Kentucky and the State of Ohio, appeared as a friend of the Court. (R. 3). On this day, the Petitioner requested that appointed counsel be withdrawn as his legal representative. (R. 4). The Petitioner tendered two Motions, Pro Se, to the Court which sought two things: the removal of Mr. Blaine as trial counsel and a reasonable continuance for newly employed counsel to prepare Petitioner's defense. (R. 4).

The Petitioner and the friend of the Court, Mr. Robert E. Sanders, informed the Court that Mr. Morris Dees and Mr. John Carroll of Montgomery, Alabama, Mr. David Bires of Houston, Texas, and Mr. Sanders himself, had agreed to represent the Petitioner in this capital offense. (R. 7). The Petitioner was unable to secure the help of these superb legal counsels until just prior to April 17, 1980. This indigent was being afforded the opportunity to have the most able representation that could be found.

The Court refused to consider the Motions tendered by the Petitioner unless Mr. Blaine adopted the Motions as his own. (R. 4). The Court stated flatly that it would not allow an attorney that was appointed and assigned by the Court to a particular case to withdraw or be removed unless the attorney advised the Court personally that some conflict of interest existed or the attorney was unable to proceed in the best interests of the defendant represented. (R. 4-5). Furthermore, the Trial Court stated it would not dismiss appointed counsel, Victor Blaine, because the Court knew that Mr. Blaine was competent to represent this Petitioner or any other defendant charged with a serious criminal

offense. (R. 5). Mr. Blaine refused to adopt the Motions of the Petitioner as his own.

The trial date of April 22, 1980, was the first setting of this case for trial. (R. 8). Neither the State nor the Petitioner had sought any continuances in this matter. (R. 8). The Petitioner brought his Motion for continuance five days before the trial setting because he had been unable before that date to obtain representation of his own choosing until that time. (R. 8-11).

The Petitioner informed the Court that a continuance was necessary to allow newly employed counsel an opportunity to prepare his defense and to conclude major litigation they were engaged in at that time. Mr. Dees and Mr. Carroll are both employed by the Southern Poverty Law Center. Each was engaged in litigation which prevented them from assisting Petitioner unless a continuance was granted. (R. 12). Each of the counsel engaged felt necessary delay was required to adequately investigate and prepare for trial. (R. 12).

The Petitioner, Charles William Bass, did not desire the services of Blaine and voiced that opinion to the Trial Court as soon as he was secure in that knowledge that the named attorneys would assist him. (R. 13). The Motion for Mr. Blaine to be removed and a continuance granted was made by the Petitioner two days after he was made aware of their offer to assist and provide legal representation to him.

On April 17, 1980, the Trial Judge Miron A. Love denied the Petitioner's Motions and forced the Petitioner to trial with appointed counsel, thereby preventing him from being represented by counsel of his own choosing. (R. 4-15). After a trial with appointed counsel, the Petitioner was found guilty at the conclusion of the penalty phase of the trial, sentenced to death.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL AS GUARANTEED BY THE SIXTH AND THE FOURTEENTH AMENDMENTS BY TRIAL COURT'S DENIAL OF MOTION TO REMOVE COURT APPOINTED COUNSEL AND TO GRANT A CONTINUANCE TO ALLOW RETAINED COUNSEL THE OPPORTUNITY TO PREPARE FOR TRIAL.

Petitioner was able for the first time to retain counsel five days before his capital case was set for trial. He moved the Court requesting removal of appointed counsel and a continuance to allow his retained counsel time to prepare for his defense. The newly retained counsel needed time to properly investigate the facts surrounding the event and to prepare the proper legal arguments necessary in a complex capital case.

This Court has long held that the right to counsel guaranteed by the Sixth Amendment to the United States Constitution and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution are not satisfied by mere pro forma assistance of counsel. The right to counsel is an essential and vital component of due process which can be traced to Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The Sixth and Fourteenth Amendments mandate a substantive guarantee of effective representation. Avery v. Alabama, 308 U.S. 444, 446 (1940). "The fundamental right to counsel is only satisfied when the Courts' deem the assistance of counsel meets the standard of effective assistance of counsel." Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). One of the prerequisites of effective assistance of counsel is the requirement that the defendant be able to assist in his own defense. See United States ex. rel. Carey v. Rundie, 409 Fed.2nd 1210, 1212-15 (3rdCir. 1969), cert denied, 397 U.S. 949 (1970).

The right to effective assistance of counsel would mean little unless the defendant was given the reasonable

opportunity to employ and consult with counsel. See Chandler v. Fretag, 348 U.S. 3 (1954).

The right to have assistance of counsel has been extended to allow the defendant the opportunity to obtain counsel of his choice to prepare and conduct his defense. Gandy v. State of Alabama, 569 Fed.2nd 1318 (5thCir. 1978). "The right to counsel is a basic right, and the ability to choose one's own counsel is a vital element in the exercise of this right." Cleveland v. United States, 322 Fed.2nd 401, 402 (D.C.Cir. 1963). The right to have the assistance of counsel includes the right to select one's own counsel. See U.S. v. Liddy, 348 Fed.Supp. 198 (D.C.Dis. 1972); United States ex. rel. O'Neill v. Rundle, 230 Fed.Supp. 323 (E.D.PA. 1964), affirmed, 341 Fed.2nd 303, (3rdCir. 1965), cert denied, 381 U.S. 944 (1965); Mulkovich v. State, 243 N.W.2nd 198 (Wis. 1976); People v. Jeffrey, 418 N.E.2nd 880 (Ill. App. 1981); People v. Thompson, 416 N.E.2nd 1105 (Ill. App. 1981); People v. Green, 248 N.E.2nd 116 (Ill. 1969). This Court expressly addressed this issue. In Crooker v. California, the Court ruled the right to have the assistance of counsel when confronted with criminal charges includes the essential element of choosing counsel of one's own preference. 357 U.S. 433 (1958); Powell v. Alabama, supra at 45.

In the case at bar, the Petitioner was an indigent. The Trial Court appointed an attorney to represent him. Communications between the Petitioner and his court-appointed attorney broke down. (R. 6). The Petitioner was unable, because of his poverty, to obtain legal assistance other than the aforementioned appointed counsel until shortly before the trial date. (R. 6-7). Shortly before the trial setting, the Petitioner was able to obtain counsel of his own choosing; therefore, he properly tendered a Motion Pro Se to have appointed counsel removed and a continuance granted to allow newly retained counsel the opportunity to adequately prepare his defense. Petitioner sought to have his appointed counsel

removed five days before the case was set for trial. When irreconcilable differences have caused the attorney-client relationship to break down, various courts have allowed the defendant to replace and remove his appointed counsel shortly before a trial date was reached. State v. George, 414 P.2nd 730 (Ariz. 1966); People v. Williams, 194 N.W.2nd 337 (Mich 1972). The right to have counsel of one's own choosing is not absolute. The exercise of this right guaranteed by the due process clause of the Fourteenth Amendment must be counterbalanced against the Court's interest in the orderly administration of justice. See United States v. Upton, 531 Fed.2nd 1281 (5thCir. 1976). A Court confronted with the decision of whether to grant a continuance to allow a defendant to remove his counsel should consider certain important factors such as the length of the requested delay; whether any continuances have been previously granted; whether delay sought is for a legitimate reason, or whether it is dilitory and contrived; and the affect the continuance would have on the litigants, witnesses, respective counsel and the Court. See Giacalone v. Lucas, 445 Fed.2nd 1238 (6thCir. 1971), cert denied, 405 U.S. 922 (1972). If the factors set forth by the Sixth Circuit Court of Appeals in Giacalone v. Lucas are followed in the present case, the right of the Petitioner to select counsel of his own choosing seems clearly to outweigh the Court's interest in the orderly administration of justice. The Petitioner sought a delay of approximately three months for a trial which had been set only two months earlier. Neither the Petitioner nor the State had requested any continuances in this capital case. (R. 8). The reason the Petitioner requested the delay was because he felt he could not assist the appointed counsel with his defense. Irreconcilable differences had erupted between the Petitioner and his attorney. (R. 6-7). Petitioner did not seek the change prior to April 17, 1980, because he was an indigent and unable to obtain counsel of his own choosing until the Southern Poverty Law

Center and other interested attorneys decided to offer their assistance to his worthy cause. (R. 12).

The prosecution voiced objection to the continuance stating that two potential witnesses had already died prior to trial. (R. 9). However, the Petitioner should not and cannot be penalized for these events for which he had no control and which had in fact already occurred regardless of the Court's ruling on his Motion for continuance. The defendant's right to be represented by counsel of his own choosing must not be abridged simply because of inconvenience to the prosecution. See Patton v. State of North Carolina, 315 Fed.2nd 643 (4thCir. 1963); U.S. v. Bentoena, 319 Fed.2nd 1916 (2ndCir. 1963), cert denied, 375 U.S. 940 (1963). The Trial Court refused to grant the Petitioner's request to remove appointed counsel because the Trial Judge had assigned counsel to the case and stated that he knew personally that appointed counsel "... was competent to represent the Appellant or any other defendant charged with a serious criminal offense". (R. 5). The right to counsel of one's own choosing does not revolve around whether appointed counsel was competent, but whether or not the defendant has the opportunity to select counsel of his own choosing. See Galssen v. United States, 315 U.S. 60 (1942); United States v. Johnson, 318 Fed.2nd 288 (6thCir. 1963); Gatsen v. United States, 223 Fed.2nd 627 (D.C.Cir. 1955). The fact that appointed counsel was adequate to defend the Petitioner does not override Petitioner's right to be represented by counsel of his own choosing. The Court was made aware of the differences between the appointed counsel and Petitioner; yet elected to proceed without investigating into the alleged differences. The fact that the Petitioner did not seek to remove counsel until five days before the trial date had arrived should not outweigh his right to select counsel of his own choosing. In United States ex. rel. Carey v. Rundie, supra at 1215, a continuance was granted on the date of the trial to allow the defendant to obtain counsel of his own choosing. In Patton v.

North Carolina, supra, stated that the fact the defendant had not sought or requested any prior continuances should be weighed heavily in his favor in determining whether the Trial Court abused its discretion in not granting a continuance to allow for a change of counsel. Id. In Patton v. North Carolina, supra, Appellant therein requested a continuance five days prior to the date set for trial. The Appellant had not sought or been granted any prior continuances; and the Trial Court's denial of his request for continuance was deemed to be an abuse of discretion. "To compel one charged with a grievious crime to undergo a trial with the assistance of counsel with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of counsel whatsoever." Brown v. Graven, 424 Fed.2nd 1166, 1170 (4thCir. 1970). In Brown, the Circuit Court of Appeals stated that any Trial Court confronted with this problem of a breakdown in communication should conduct a serious investigation into the basis of such claim. Id. In the case at bar, the Trial Judge was confronted with such a claim. (R. 5). However, the Court when confronted with this problem did not investigate into the basis of the discord between the Petitioner and appointed counsel. Effective assistance of counsel, perhaps more than any other single aspect of a criminal trial, is indispensible to "a fair trial and the reliability of the truth determining process". Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973). See also Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Caraway v. Beto, 421 Fed.2nd 636, 637-38 (5thCir. 1970). When an individual is sentenced to death or life imprisonment, claims of ineffective representation must be examined very closely where the possible penalty is death. See, e.g., Voyles v. Watkins, 489 Fed.Supp. 901, 910 (N.D. Miss. 1980).

The Petitioner readily recognizes that a Trial Court has the discretion to proceed with a criminal case if the administration of justice so requires. U.S. v. Terry, 449 Fed. 2nd 727 (5thCir. 1971). In the case at bar, however, the Trial

Court overruled the Petitioner's Motion simply because the Court felt there was no protected right involved and the appointed counsel was competent to defend the Petitioner. (R. 14). However, Petitioner contends that the Sixth and Fourteenth Amendments to the United States Constitution dictate that a defendant has the right as part of his constitutionally protected right to have effective assistance of counsel, to select counsel of his own choosing unless the administration of justice requires otherwise. The protection afforded to this right of the Constitution requires an investigation into the allegations of the Petitioner and the competence "of counsel is irrelevant in determining whether the protected right has been infringed upon". See Gatsen v. United States, supra; Gadseden v. United States, supra. The mere fact that representation for a particular defendant was adequate, does not allow a Court to override and to infringe upon the defendant's right to select his own counsel.

The defendant's right to representation by retained counsel of choice under the Sixth and Fourteenth Amendments to the United States Constitution as articulated in Powell v. Alabama, supra, and followed by many cases thereafter, was infringed upon by the Texas Trial Court April 17, 1980. The Petitioner was denied his right to be represented by retained counsel of his own choosing. The Petitioner was forced to trial with a lawyer with whom he could not communicate and whom he had no confidence; he had a reasonable opportunity to have counsel of his own choice, however, the Trial Court committed serious error in failing to grant Petitioner's request for a continuance to facilitate the assumption of the case by retained counsel. The Petitioner had requested no prior continuances and none had been granted. The only compelling reason for the failure to grant the continuance was the "inconvenience to the prosecution". The Petitioner was forced to go to trial for his very life with a lawyer who was unprepared, with whom he could not communicate, and whose services he did not want or desire.

Petitioner's Sixth and Fourteenth Amendment right to select counsel of his own choosing and to effectively assist that counsel in his own defense was violated by the Texas Trial Court. The Texas Court of Criminal Appeals, failed to respond to Petitioner's Appeal on this ground; and therefore placed itself in the position of silently denying Petitioner's right and rights as guaranteed by the United States Constitution. The Petitioner's life at stake, this Court should grant Certiorari to resolve this issue.

II.

ADMISSION OF EVIDENCE OF EXTRANEOUS OFFENSE DURING GUILT AND INNOCENCE STAGE OF TRIAL TO PROVE IDENTITY VIOLATED PETITIONER'S RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS.

A fundamental rule of evidence is that an individual charged with a crime is to be tried for the offense charged and no other, and evidence that one is a criminal, generally, is inadmissible. Albricht v. State, 486 S.W.2nd 97 (Tex. Crim. App. 1972). There are exceptions to this basic rule which are well known, such as:

1. when the extraneous offense is res gestae of the charged offense;
2. to prove identity;
3. to rebut a defensive theory;
4. to prove guilty knowledge;
5. to prove intent;
6. to prove motive;
7. to prove system; or
8. in a circumstantial evidence case. Id.

The accused may not be tried for a collateral offense, and therefore can only be prosecuted for the charged crime. Hines v. State, 571 S.W.2nd 322 (1959).

At the Petitioner's trial, over his objection, the Trial Court allowed Theresa Menor to testify that she had seen the Petitioner fire a handgun twice in the direction of a neighbor's house. Later testimony given by Officer Paul Motard of the Houston Police Department established that a slug removed from the dead officer's body matched a slug removed from the aforementioned neighbor's house. The testimony established the slugs came from the handgun belonging to the Petitioner.

The State offered the extraneous offense under the theory that it was necessary to establish identity, an exception to the stated rule excluding such admission. The rule in Texas is that when the identification of the accused is not complete, the prosecution may establish

necessary element by introducing an extraneous offense. Ford v. State, 484 S.W.2nd 727 (Tex. Crim. App. 1972). In the Petitioner's case, the question of identity had been unequivocally established.

The State offered the evidence for the stated purpose and none other. Such an offense would at least be a misdemeanor under the laws of Texas. Under the Texas system of capital murder, the first stage of the trial would clearly have been tainted by the introduction of the extraneous offense. The basic thrust of the Texas statute is to ascertain whether the named defendant committed the act and whether beyond a reasonable doubt there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. V.T.C.A. Penal Code §37.071(b)(2). The introduction of extraneous offense at the early stages of trial would have surely prejudiced the mind of the jurors.

In the Petitioner's testimony, he stated that he shot Officer Baker because he was afraid that he was going to be beaten by the officers. He testified he had on several occasions been beaten by law enforcement officers. The Petitioner's basic defense was self-defense. The admission of the extraneous offense certainly weakened his credibility before the jury.

The Texas Court of Criminal Appeals recognized that the admission of the evidence was erroneous, but not such to warrant a new trial. (See Appendix C, pp. 3-5). The Petitioner was on trial for his life and the admission of a serious extraneous offense involving the use of a handgun was highly prejudicial and denied Petitioner's right to a fair trial. It is impossible to be certain that the testimony did not seriously affect the decision making process of the jury; consequently, this Court should grant Certiorari to provide Petitioner with his fair trial.

III.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICED GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE COURT PROCEEDED TO TRIAL WITH MARILYN JANET TURNER AS A JUROR.

The Petitioner was forced to stand trial for his life with Marilyn Janet Turner as a juror after she properly informed the Court that an unknown assailant had broken into her home and threatened her with a kitchen knife. (R. 2454). She informed the Court that she could not be fair or impartial. She stated as follows:

> "At this time there's no way I can put that out of my mind. I feel I cannot unpartially judge. All I can think of is I can be dead."
>
> "I do not feel I'm capable of being impartial at this time or much less putting this out of my mind. I cannot concentrate. I honestly feel I would not be fair to the people involved in this case." (R. 2454).

All efforts on the part of the State and the Trial Judge failed to rehabilitate this juror. Marilyn Janet Turner steadfastly adhered to the view that she could not be fair and impartial and place the recent events in her personal life aside. (R. 2455).

In an analagous situation, the Texas Court of Criminal Appeals reversed a conviction when the venireman stated he was prejudiced against a particular defendant; but later stated he could set aside his prejudice in Williams v. State, 565 S.W.2nd 63 (Tex. Crim. App. 1978). In Williams v. State, the Texas Court of Criminal Appeals recognized the gravity of the situation of being on trial for one's life

and would not allow a conviction to stand if the taint of prejudice existed.

In Brandon v. State, 599 S.W.2nd 567 (Tex. Crim. App. 1980). The Texas Court of Criminal Appeals reversed a conviction when it was revealed that the verireman had stated he had a prejudice and bias against the accused because his brother-in-law worked with the homicide division of the police department. Id. The Court properly recognized that a defendant cannot achieve a fair trial where there is the taint of bias or prejudice. Id.

The Trial Court refused to discharge this juror under Article 36.29 V.A.C.C.P. which provides:

> Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the Court read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

The Trial Court felt that this Article was limited. However, surely the mandate of due process would require that a juror such as Marilyn Turner be disqualified under this Article.

The Petitioner was denied a fair trial guaranteed by the Constitution when this particular juror filled with bias and prejudice was allowed to determine his fate.

IV.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICIAL GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE COURT EXCLUDED PROSPECTIVE JUROR MARIAN HALL.

In Witherspoon v. Illinois, supra, this Court stated:

> "we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voice general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

This Court held in Adams v. Texas, supra, that the Texas Penal Code Section 12.31(b) could not be used or interpreted in such a manner that jurors would be excluded on grounds broader than Witherspoon.

The voir dire of prospective juror Marian Hall is found at R. 2416-2454. Her basic objection to the death penalty was as follows:

> Q. . . Do you have any objections, conscientious objections to the infliction of death as a punishment for crime in a proper case?
>
> A. . . No, I guess not.
>
> Q. . . Well, basically, I'm trying to find out, first of all, do you agree with the death penalty or not?
>
> A. . . I can't say. I don't think -- I have to either say yes or no?
>
> Q. . . Yes?
>
> A. . . No. But, on the other hand, I do think I could carry out the law. If that's the law, if I were on the jury, I would carry it out.
>
> A. . . I can't say I object, but I could give somebody the death penalty if there's no other way to make sure

they are not back on the streets."
(R. 2476, lines 9-11).

A. . . I don't believe in the death penalty. I would rationalize that I am not giving it to him, that I am not giving it to him, the State is." (R. 2436, lines 22-24).

The State challenged this prospective juror for cause under Texas Penal Code Section 12.31(b) and the Trial Court sustained the challenge. (R. 2444, 2450-2451). A careful examination of this juror's response clearly shows she was improperly excluded under the rationale of Witherspoon. The exclusion by the Trial Court of this prospective juror means the death penalty cannot be properly imposed. See Davis v. Georgia, 429 U.S. 122 (1976).

Trial Counsel for the Petitioner did not object to the exclusion of this juror. Under the law of Texas, such a failure waives the error. See Boubvare v. State, 542 S.W. 2nd 644 (Tex. Crim. App. 1976); Russell v. State, 598 S.W.2nd 677 (Tex. Crim. App. 1980); Hughes v. State, 562 S.W.2nd 857 (Tex. Crim. App. 1978). However, when an individual's life hangs in the balance, such a waiver by trial counsel should not be fatal to the rights of the Petitioner. The better rule of law would seem to be that in capital cases, such error cannot be waived. See Wigglesworth v. Ohio, 403 U.S. 947 (1970).

Under the rationale of Witherspoon, Adams v. Texas, and Davis v. Georgia, the Petitioner was not afforded a fair trial within the mandates of the Constitution and this Court.

V.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICIAL GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT EXCLUDED PROSPECTIVE JUROR MILDRED SPENSLEY.

The ground of error regarding prospective juror Mildred Spensley is the same basic argument as set forth in Ground IV with regard to prospective juror Marian Hall.

The voir dire examination of juror Mildred Spensley is set forth at R. 2153-2167. This prospective juror was qualified under the rationale of Adams v. Texas, supra, and Witherspoon v. Illinois, supra. This individual articulated reservations about the death penalty, but stated quite succinctly that she could follow the law and vote death in the proper case.

The critical portion of her voir dire is set forth below:

> Q. . . . Now, do you have any conscientious objections to the assessment of death as a punishment for crime in a proper case?
> A. . . Well, . . . I have maintained many times that in certain circumstances I believed it should occur. (R. 2154, lines 5-10)
> Q. . . You said that you -- well, I was curious as to when you thought the death penalty should occur. You mentioned in some cases you thought it was proper.
> A. . . I have thought about it and discussed. I do think it's proper in certain cases. (R. 2157, lines 9-15)
> Q. . . Do you feel like you have to answer one of those questions no to make sure he got life imprisonment instead of death, regardless of how much evidence the State showed you?
> A. . . No, I don't feel that I have to say no if I felt yes.

Q. . . Do you think you could vote for the death penalty, is that what you are saying?

A. . . I could vote for it, but I would be very unhappy probably the rest of my life. (R. 2162, line 21 - R. 2163, line 4)

It is clear from her answers that this prospective juror was qualified to sit on the jury in this capital murder case. However, the State challenged for cause and the Trial Court sustained the challenge. (R. 2165-67).

Under the rationale of Davis v. Georgia, supra, and Witherspoon v. Illinois, supra, the action of the Trial Court denied the Petitioner of the protection granted him by the Constitution and this Court. Trial Counsel again did not object, but the better rule of law articulated in Wigglesworth v. Ohio is that such failure should not be fatal to the rights of the Petitioner.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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